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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA., COMERCIAL ESTRELLA LTDA., and CONFECCIONES Y TEJIDOS NACIONALES LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE SECOND CIRCUIT ERR IN DISREGARDING THE EXPANDED AMENDED DEFINITION OF "INTERCEPT" AND "DEVICE," SPECIFICALLY ENACTED IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986, 18 U.S.C. § 2510(4), (5), (12) AND (15), TO PROTECT INTERNATIONAL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT ON AN ELECTRONIC COMMUNICATION SERVICE?

II. DID THE SECOND CIRCUIT ERR IN DISREGARDING THE REQUIREMENTS OF 18 U.S.C. § 2518(9), AND THUS FAILED TO EXCLUDE THE ADMISSION INTO EVIDENCE OF THE ELECTRONIC COMMUNICATIONS IN TRANSIT OR COMPUTER STORAGE, WHICH THE UNITED STATES PROCURED ACCESS TO WITHOUT EITHER JUDICIAL AUTHORITY REQUIRED UNDER 18 U.S.C. § 2516(3), OR ANY WARRANTS ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRED UNDER 28 U.S.C. § 2703(a)?

III. DID THE SECOND CIRCUIT ERR IN NOT EXCLUDING AS EVIDENCE THE ELECTRONIC COMMUNICATIONS THE UNITED STATES PROCURED ACCESS TO THROUGH THE USE OF THE GENERAL IN REM WARRANT, AND GENERAL "RUBBER STAMPED" DEA SUBPOENA, BECAUSE ON THEIR FACE THESE DOCUMENTS VIOLATED THE PROHIBITION AGAINST THE USE OF "GENERAL WARRANT" UNDER THE FOURTH AMENDMENT?

IV. WHETHER THE LOWER COURTS ERRED IN FAILING TO SEPARATE THE CLAIMANTS, AND THEREBY FAILED TO TRACE EACH INTERCEPTED ELECTRONIC COMMUNICATION TO AN ILLEGAL SOURCE OR ACTIVITY?

V. DID THE SECOND CIRCUIT ERR IN FAILING TO COMPLY WITH THE HOLDING IN AUSTIN, WHEN IT FOUND THE ENTIRE INTERCEPTED ELECTRONIC FUND TRANSFER FORFEITABLE ALTHOUGH CLAIMANTS ARE INNOCENT OF ANY CRIME?

VI. DID THE SECOND CIRCUIT ERR IN DENYING DAMAGES UNDER 18 U.S.C. § 2520, ALTHOUGH THE UNITED STATES ADMITTED TO ORDERING THE PROGRAMMING OF "STOP QUES" IN THE COMPUTER MODEM DEVICES OF A COMMUNICATION SERVICE TO THE PUBLIC, TO OBTAIN ACCESS TO ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA WITHOUT THE JUDICIAL AUTHORITY REQUIRED UNDER 18 U.S.C. § 2516(3)?

VII. DID THE SECOND CIRCUIT ERR IN TOTALLY IGNORING THE CLAIMS FOR DAMAGES UNDER 18 U.S.C. § 2707, WHICH WERE BASED ON THE ADMITTED DISCLOSURE TO THE UNITED STATES OF ALL ELECTRONIC COMMUNICATIONS IN COMPUTER STORAGE WHICH HAD GONE TO THE REPUBLIC OF COLOMBIA, ALTHOUGH NO WARRANT WAS SOUGHT OR ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE AS MANDATED UNDER 18 U.S.C. § 2703(a)?

VIII. DID THE SECOND CIRCUIT ERR IN DENYING THE LIMITED PARTNERSHIPS' CLAIMS FOR DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978, 12 U.S.C. § 3403(a), ALTHOUGH THE INTERMEDIARY BANKS ADMITTED TO REPEATEDLY DISCLOSING THE FINANCIAL INFORMATION STORED IN THE LIMITED PARTNERSHIPS "STOP QUE" ACCOUNTS, AND TO RECEIVING COMPENSATION UNDER THE RIGHT TO FINANCIAL PRIVACY ACT?

LIST OF PARTIES

In accordance Rule 12 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of a final decision in United States v. Merrill Lynch Bank, ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993).

The parties that have appeared in this case included those listed on the case caption. As this is a Government initiated civil forfeiture case, the parties below also included Manufacturera del Atlantico Ltda., Manufacturas Internacionales Ltda., Organizacion JD Ltda., Manufacturas JD Ltda., Industrias Marathon Ltda., Comercial Samora Ltda., Abuchaibe Hnos. Ltda., Manufacturas de Moda Ltda; Incolco Ltda; Creaciones

Karen Ltda; Tote Export Manufacturas Ltda; Creaciones Ivonne Ltda.; Confecciones Zuny Ltda., and Valery Fashions Ltda.

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda., have neither parent companies nor subsidiary companies.

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IN THE
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OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioner,

v.

United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda. (hereinafter "Limited Partnerships")[1]

[1]The Limited Partnership are owned by one or two persons, to fabricate and export finished clothing from Barranquilla, Republic of Colombia.

pray that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Second Circuit. In the alternative, an Order should be issued vacating the Second Circuit's decision and ordering reconsideration in light of the provisions of the Electronic Communications Privacy Act and the Right to Financial Privacy Act, as well as this Courts holding in Austin v. United States.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District is reported at 801 F.Supp 984 (1992), and is reproduced at App. 1a.[2] The

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They are is incorporated under the Civil Code of the Republic of Colombia, and have never conducted any commercial activity in the United States.

[2]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

opinion of the United States Court of Appeals for the Second Circuit is not yet reported, and is reproduced at App. 1b. The Order Denying the Petition for Rehearing dated October 6, 1993, is reproduced at App. 1c.

STATEMENT OF JURISDICTION

The Second Circuit issued its opinion on September 10, 1993. It denied a petition for rehearing on October 6, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510:

(4) "intercept" means the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication.

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . .

18 U.S.C. § 2511(1)(a):

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(b) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3):

> Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2518(9):

> The contents of any . . . electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal of State court unless each party, not less than ten days before trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. . . .

18 U.S.C. § 2520:

> (a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally

used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

18 U.S.C. § 2702(a):

Prohibitions.- Except as provided in subsection (b)-(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2703:

REQUIREMENTS OF GOVERNMENT ACCESS.

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**- (1) A government entity may require a

provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

> (A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or
>
> (B) with prior notice from the government entity to the subscriber or customer if the government entity-
>
> (i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
>
> (ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2707:

(a) **Cause of action-** Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

12 U.S.C. § 3401:

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

12 U.S.C. § 3403:

(a) Release of records by financial institutions prohibited

No financial institution, or officer, employee, or agent or a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The United States brought this civil forfeiture in New York pursuant to 18 U.S.C. 981, invoking the rules of

admiralty codified in the Supplemental Rules of Civil Procedure. The Limited Partnerships filed their respective claims under Rule C(6), their respective claims for damages based upon the provisions of 18 U.S.C. § 2520, and § 2707; and 12 U.S.C. § 3416; and, among other things moved to dismiss because the res were various electronic communications and thus not subject to in rem process as a result of the Electronic Communication Privacy Act.

The District Court rejected the Limited Partnerships's jurisdictional objection, denied all of the claims for damages based on the relation back doctrine, and based on a jury verdict found the various electronic communications forfeitable.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. 1291.

B. RELEVANT FACTS

On July 13, 1990, Assistant United States Attorneys for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown (hereinafter Messrs. Hui and Brown), ordered the distribution of copies of a general civil in rem warrant and complaint to all intermediary banks[3] in the greater New York area, including Manufacturers Hanover Trust Company, Banco Atlantico, and The Bank

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[3]All domestic and international electronic fund transfer communication must pass through a sender bank, various intermediary banks, and a beneficiary bank. They all are providing an "electronic communication service" 18 U.S.C. § 2510(15), to the public, as part of the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems. This public service is of great domestic and international importance, as indicated by the fact that daily over 1 trillion dollars are being transferred world-wide via electronic communications.

of New York (hereinafter the "Intermediary Banks").

This general warrant sought only the seizure of a bank account at Merrill Lynch in Columbus Ohio, and did not mention the Limited Partnerships, nor any other electronic fund transfer going to the Republic of Colombia (Lod. 1).

On July 17, 1990, Messrs. Hui and Brown, issued verbal telephone orders to the Intermediary Banks to procure their collaboration as providers of an electronic communication service to the public within the Fedwire, SWIFT, and CHIPS electronic communication systems; so on behalf of the United States the Intermediary Banks would perform general searches of <u>all</u> electronic fund communications going to the Republic of Colombia, regardless of the intended beneficiary.

Based on these verbal instructions the Intermediary Banks admitted to knowingly inserting "stop ques" in their computer communication modem devices so to intercept[4] all electronic funds transfer communications in transit to any third party beneficiary in the Republic of Colombia.

Once the programmed "stop ques" had intercepted the electronic communications, and the messages were placed in computer storage, the Intermediary Banks knowingly failed to comply with the in-

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[4]Although the term "freeze," was used by the Intermediary Banks in their explanation of their handling of the electronic communication (Lod. 8), and by the Second Circuit in their decision (App. 11b); research of the term "freeze," confirms that it has no meaning in the context of electronic communication technology.

Based on the admitted fact that access to the electronic communications in transit was procured through the programming of "stop ques" in the Intermediary Banks computer modem devices, the requirements of the definitions of both "intercept" and "device" in 18 U.S.C. 2510(4) and (5), were satisfied.

struction contained in the electronic fund transfer communication.

On July 19, 1990, based only on the verbal orders of Messrs. Hui and Brown an electronic communication transferring $125,025.00, to Creaciones Viviana Ltda. was intercepted by Banco Atlantico (Lod. 2).

This in transit electronic communication was placed in computer storage at Banco Atlantico, and then after disclosed to Messrs. Hui and Brown.

Subsequently on July 20, 1990, based only on information disclosed by the general in rem warrant of July 13, 1990, a Third Amended In Rem Complaint (Lod. 3), and a general DEA administrative subpoena were issued and served on Banco Atlantico (Lod. 4), and Manufacturers Hanover Trust Company (Lod. 5),

but were not served on the Bank of New York.

The United States admitted that this general rubber stamped DEA subpoena sought the information contained in all the electronic funds transfers previously transmitted to the Republic of Colombia during the prior 180 days, and was issued specifying with instructions that no notice be give to either the Beneficiary Bank or the Limited Partnerships, as required under 18 U.S.C. § 2703(b).

Although Commercial Estrella was named in the Third Amended In Rem Complaint, it was not named in the general DEA administrative subpoena of July 20, 1990 (Lod 4 and Lod. 5).

Neither Creaciones Viviana Ltda., nor Confecciones y Tejidos Nacionales Ltda., were named in either the Third

Amended In Rem Compliant or the general DEA administrative subpoena of July 20, 1990 (Lod. 4 and Lod. 5).

Thus based only on the verbal orders of Messrs. Hui and Brown, and the Third Amended In Rem Complaint on July 24, 1990, the international electronic fund transfer belonging to the Comercial Estrella for $301,500.00, was intercepted at Banco Atlantico. The electronic communication was then placed in computer storage, and then disclosed to the United States (Lod. 6).

Based on the information divulged and disclosed by the Intermediary Banks a Sixth Amended In Rem Complaint, naming all three Limited Partnerships, was filed and served on July 24, 1990, on only the Bank of New York (Lod. 7), but

not on Banco Atlantico or Manufacturers Hanover Trust Company.

Therefore again based on the verbal orders of Messrs. Hui and Brown, on July 26, 1990, an international electronic fund transfers to Confecciones y Tejidos Nacionales Ltda., for $549,910.00, was intercepted by Manufacturers Hanover Trust Company (Lod. 9). The information was then placed in an account in computer storage, and disclosed to the United States (Lod. 8).

On July 31, 1990, a week after the electronic communication intercepted the Sixth Amended In Rem Complaint was served on Banco Atlantico and Manufacturers Hanover Trust Company (Lod. 10 and 11).

On August 6, 1990, two international electronic fund transfer belonging to

the Creaciones Viviana for $50,000.00 (Lod. 12), and $50,033.00 (Lod. 13), were intercepted by The Bank of New York. These electronic communication were then placed in computer storage, and disclosed to the United States.

The Intermediary Banks have admitted that after the "freezing" of each electronic funds transfer communications belonging to the Limited Partnerships, the transmission were placed in computer storage in "stop que" accounts under the name of each beneficiary. The Intermediary Banks have admitted holding the funds in these accounts until the funds were sent to the Clerk of the Court for the Eastern District of New York in late August, 1990 (Lod. 8).

The Limited Partnerships filed both verified claim for their funds, and

claims against the United States for the unauthorized interception of their electronic communications, and for the disclosure of their electronic communication information.

In June, 1991, under the authority of the Right to Financial Privacy Act of 1978, the Intermediary Banks applied for and were compensated for all of their costs relating to their collaboration with the United States (Lod. 16).

From November, 1990, through March, 1992, during attempted discovery of the United States and the Intermediary Banks, Judge Weinstein first granted to the United States an ex parte stay from all discovery for over eight months; and then when the stay was lifted, denied

discovery of both the United States, and the Intermediary Banks.[5]

On March 3, 1992, one day before the start of the two month jury trial, Judge Weinstein dismissed the claims against the United States.[6]

Judge Weinstein refused repeatedly all request by the Limited Partnerships pursuant to 18 U.S.C. § 2518(9), that

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[5]Since all discovery was denied, the exact number of electronic communications intercepted in transit to the Republic of Colombia is not known. However, it is known that contrary to the regulations of the Federal Reserve, and the agreement entered into to be a part of the FEDWIRE, SWIFT and CHIPS electronic communication systems, the Intermediary Banks neither notified the sender, the Federal Reserve, the beneficiary bank, nor any third party beneficiaries in the Republic of Colombia, that they would not comply with the instructions contained in the intercepted electronic communications.

[6]All the claims for damages for violation under the Electronic Communications Privacy Act were dismissed based on the relation-back doctrine. The claim for damages under Right to Financial Privacy Act, was dismissed because the Court found, although permitting no discovery on the issue, that no "account" was held in the name of the Limited Partnership, although being the intended beneficiary.

the United States produce the judicial authorization for the interception of their electronic communications.

Finally, based on the relation back doctrine, Judge Weinstein denied the Limited Partnerships motions pursuant to 28 U.S.C. § 2518(9), to exclude as evidence all intercepted and disclosed electronic communication obtained by the United States without judicial authorization.

The Second Circuit held that 18 U.S.C. § 2510 et seq., did not apply because of its use of the 1968 definition of the term "intercept."

The Second Circuit failed to consider in any manner the violations of the prohibitions against "disclosure" under 18 U.S.C. §§ 2511(1)(c) and (3)-(a); 2702(a), and 2703(a).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT ERRED BY INTENTIONALLY FAILING TO CONSIDER THE ADMITTED UNAUTHORIZED "DISCLOSURE" OF ELECTRONIC COMMUNICATIONS IN TRANSIT AND COMPUTER STORAGE, AND IN USING THE OLD 1968 DEFINITION OF "INTERCEPT" AND "DEVICE," SO TO HOLD THAT THE PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES DID NOT CONSTITUTE "INTERCEPT," AND THUS THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986 DID NOT APPLY.

Prior to 1986, Congress and others were concerned that modern communication modes, and their future development, such as electronic fund transfers and other computer messaging, might be constitutionally less confidential than older methods.[7]

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[7]Senator Pat Leahy wrote to the then Attorney General on his concern for the protection of information in electronic communication. See Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986, p. 3557 (hereinafter "Senate Report"). See also Electronic Communication Privacy Act of 1986, House Report No. 99-647, June 19, 1986, Committee on the Judiciary, 99th Congress (hereinafter "House Report").

At the time there were three possible Fourth Amendment arguments advanced to justify warrantless searches of computer messages, or records thereof, under the control of a third-party computer service provider:

1. The user disclosed their messages to the third party, as the customer in United States v. Miller, 425 U.S. 435 (1976), who disclosed his financial information to the bank, and thereby assumed the risk that the third party would disclose them to the government.

2. The third party's ability to access the user's messages deprived the user of any legitimate expectation of privacy, as happened in Smith v. Maryland, 442 U.S. 735 (1979).

3. The third party has power to consent to a search because it has "con-

current authority" over the records, as happened in United States v. Matlock, 415 U.S. 164 (1974).

In response to this, Congress amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., to specifically clarify the existence of and limits to the confidentiality rights of electronic messages by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq.[8]

These precise amendments were enacted to prevent the interception "or

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[8]The Senate Report, p. 3555, states, "[t]he Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968-the Federal wiretap law-to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of dramatic changes in new computer and telecommunications technologies."

other acquisition,"[9] of the contents of electronic funds transfer communications,[10] and to clarify the existence of and limits to the confidentiality rights of these electronic messages in transit and computer storage, vis-a-vis the Government and an electronic communication service provider.[11]

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[9]Prior to the 1986, the term "intercept" was limited to "aural acquisition," but with the enactment of amended 18 U.S.C. § 2510(4), Congress obtained a "fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." House Report at p. 19.

[10]An "electronic funds transfer communications" is the transmittal of financial information between banks via computer or other electronic messages. Because Fedwire, CHIPS, and SWIFT systems are communication service providers, electronic funds transfers in transit and storage on these systems are protected communications under 18 U.S.C. § 2516(3), and § 2703(a). See also House Report at p. 23.

[11]"The purpose of the legislation is to . . . to prohibit the interception of certain electronic communications; to provide procedures for the interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease

The amendments accomplish the following:[12]

i. they expand the definition of the term "intercept" to include the obtaining access of electronic communication. 18 U.S.C. § 2510(4).

ii. they expand the definition of the term "device" to include any device or apparatus that could intercept

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certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report, at p.16.

"In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes potential consequences of its snooping far more ominous than those of . . .private individual or firm."Id. at p. 19.

[12]In short the Electronic Communications Privacy Act, mooted arguments (1) and (2) above (insofar as they pertain to private messages in transit and short term records thereof) but left number (3) largely intact, if certain requirements were met. See Chapter 19, Confidentiality and Control of Data, at p. 361 to p. 386, of Benjamin Wright, The Law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability, November, 1991, Little, Brown and Company; See also Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987).

an electronic communication. 18 U.S. C. § 2510(5).

iii. they prohibit the intentional and unauthorized interception of an electronic communication in transmission, and the knowing disclosure or use of a communication so intercepted. 18 U.S.C. § 2511(1)(a) and (c);

iv. they prohibit a communications service provider from intentionally and illegitimately disclosing an electronic communication in transmission. 18 U.S.C. § 2511(3)(a);[13]

v. they prohibit access by both the federal and state governments to stored electronic messages and

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[13]Under the Federal Communications Act of 1934, 47 U.S.C. § 605 (1988), the ability of a communication service provider from divulging messages is also prohibited.

service providers transactional records. 18 U.S.C. §§ 2703(a); and

vi. they prohibit the unauthorized access to stored electronic communications. 18 U.S.C. § 2702(a).

Turning to United States v. Merrill Lynch Bank, 801 F.Supp 984 (1992), ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993) (hereinafter "All Funds Case"), based on the Second Circuit applying the limited old 1968 definition of "intercept" and "device," and intentionally not using the expanded 1986 amended definition in 18 U.S.C. § 2510-(4) and (5), it approved of the use of verbal orders issued by low level Department of Justice employees,[14] to pro-

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[14]In 1986, the Department of Justice, wrote to Congress to confirm that it agreed that for three years following enactment, it would require that the same senior level of authority as in 18 U.S.C. § 2516(1) (i.e. Deputy Assistant Attorney

cure the interception and disclosure of the Limited Partnerships's in transit electronic communication, and held that the Electronic Communication Privacy Act did not apply, and thus denied the Limited Partnerships all of the protection under the Act, and their claim for damages (App. 68b).

Thus in this manner the Second Circuit held that interception did not occur despite the admitted programming of "stop ques" in the Intermediary Banks' computer modem devices.[15]

General of Criminal Division or higher), be required to seek judicial authority to access electronic communication in transit under 18 U.S.C. § 2516(3). Furthermore, the Department of Justice promised to provide 90 days notice to Congress of any change in this regulation. Senate Report at p. 3682 ; House Report at p. 51.

[15]A `modem,' (modulator/demodulator), has been defined as ". . . a device used to permit communications between computers at different sites, or between a computer and remote terminal, by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C.

More interestingly, as well as far more troubling, was the Second Circuit's total ignoring of not only the specific Congressional prohibitions against "disclosure" of electronic communications in transit contained in 18 U.S.C. § 2511-(1)(a), (c) and 3(a); but also its total ignoring of the complete prohibition contained in 18 U.S.C. § 2703(a), against "disclosure" of electronic communication in computer storage for less than 180 day unless a warrant was issued under the Federal Rules of Criminal Procedures.

By ignoring these the Second Circuit condoned the use verbal order issued by employees of the United States,

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Del, 551 F.Supp. 163, 169." Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp. Thus under 18 U.S.C. § 2510(5), a device was used by the Intermediary Banks at the request of the United States.

and general in rem warrants, to acquire access to the Limited Partnerships's electronic communication stored in the Intermediary Banks's computer storage for less than 180 days, in violation of 18 U.S.C. § 2516(3), and § 2703(a)[16].

Therefor the Second Circuit decision is completely in error and must be reversed because:

First, by focusing on the old limited 1968 definition of the term "intercepts," and "device," the Second Circuit intentionally disregarded the new expanded 1986 definition which Congress specifically enacted to restrict the procuring of the interception of electronic communication in this new age of

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[16]Under 18 U.S.C. § 2703(a), access to the Limited Partnerships' electronic funds transfer communications could only be obtained through a judicial warrant issued under the Federal Rules of Criminal Procedure.

computer technology. 18 U.S.C. § 2510(4) and (5);

Second, the Second Circuit totally ignored the admitted facts that based only on verbal order, and without any judicial authority as required by 18 U.S.C. § 2516(3) and the regulations of the Department of Justice, or a warrant issued under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2703(a), "stop ques' were programmed by Intermediary Banks in their computer modem devices to monitor and acquire access to all electronic fund transfer communications going to the Republic of Colombia.

Third, Second Circuit totally ignored the prohibition in 18 U.S.C. § 2511(1)(a), against one who "procures any other person to intercept" an electronic communication;

Fourth, the Second Circuit totally ignored the prohibition against a person or entity who "intentionally discloses, to any person the contents of any electronic communication" in 18 U.S.C. § 2511(1)(c);

Fifth, the Second Circuit totally ignored the statutory prohibition against "a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication" in 18 U.S.C. § 2511 (3)(a); and,

Sixth, totally ignored the statutory prohibition against an "entity providing an electronic communication service to the public [who] knowingly divulge to any person or entity the contents of a communication while in elec-

tronic storage by that service," 18 U.S.C. § 2702(a).

II. JUDGE WEINSTEIN AND THE SECOND CIRCUIT ERRED IN ADMITTING INTO EVIDENCE THE UNAUTHORIZED INTERCEPTED AND DISCLOSED ELECTRONIC FUND TRANSFER ADVICE WITHOUT COMPLYING WITH 18 U.S.C. § 2518(9).

Despite repeated motions to seek from the United States the judicial authority it had for the interception and disclosure of the Limited Partnerships's electronic communication, Judge Weinstein refused to comply with the mandates in 18 U.S.C. § 2518(9).

Thus since His Honor failed to comply with the 18 U.S.C. § 2518(9), the Second Circuit was required to hold that all the electronic communications obtained without judicial authority under 18 U.S.C. § 2516(3) and 18 U.S.C. § 2703(a), were inadmissable as evidence. However the Second Circuit completely

ignored this statutory mandate (App. 57b).

Because this statutes were not complied with, the finding that the Limited Partnerships's electronic communication were forfeitable must be reversed.

III. THE IN REM WARRANT OF JULY 13, 1990, WAS A PROHIBITED GENERAL WARRANT WHICH VIOLATED THE FOURTH AMENDMENT, THUS THE INTERCEPTED AND DISCLOSED ELECTRONIC COMMUNICATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied., 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 72, 107 S.Ct. 1013

(1987), the Court held that, "[t]he manifest purpose of this particular requirement was to prevent general searches." Id. at 480 U.S. 84.

In this case on July 13, 1990, so to permit Messrs. Hui and Brown to rummage through every third party electronic funds transfer going to the Republic of Colombia, an overbroad general in rem warrant was issued to the Intermediary Banks, with verbal order to stop by the use of "stop ques" these electronic communications.

Thus the general in rem warrant of July 13, 1993, was in clear violation of the Fourth Amendment, and evidence obtained should have been excluded.

In Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), this Court held that the New York State

wiretapping statute was overbroad and therefore violated the Fourth Amendment because:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations . . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statutes's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures. Id. at 388 U.S. 58-60

Each of these abuses were employed to stop the electronic communication of the Limited Partnerships:

a. the communications stopped by the programming of "stop ques," were not described at all in the July 13, 1990 general in rem warrant;

b. the search of Intermediary Banks computer storage of electronic funds transfers covered the period of over 180 days, from January, 1990 through September, 1990; and,

c. Messrs. Hui and Brown had "full discretion" as to which electronic fund transfer to permit the Intermediary Banks to transmit and which to hold in computer storage.

This use of the July 13, 1990, in rem warrant cannot be permitted, and in addition to excluding any evidence obtained by the general warrant, damages, including cost and attorney fees should be awarded.

IV. THE SECOND CIRCUIT DISCRIMINATED AGAINST THE LIMITED PARTNERSHIPS BY COMBINING THEIR APPEAL WITH ALL OF THE OTHER CLAIMANTS, AND BY FAILING TO TRACE EACH SPECIFIC INTERCEPTED ELECTRONIC COMMUNICATION TO ANY ILLEGAL DRUG TRANSACTION OR DRUG MONEY LAUNDERING TRANSACTION.

The Supreme Court has held, that "[conspiracy] proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750 at 733, 66 S.Ct. 1239 (1966). Where evidence as to some conspirators spills over against another, all cannot be tried together. United States v. Camiel, 689 F.2d 31, 39 (3rd Cir. 1982). See United States v. Bertolotti, 529 F.2d 149, 156 (2d Cir. 1975).

Despite this Judge Weinstein refused repeated motions for separate trails by the different groups of claim-

ants; and the Second Circuit automatically combined the different group of claimants although their Notice of Appeals were filed separately.

However, it is apparent from the numerous errors of facts in both Judge Weinstein's and the Second Circuit's decisions that the Limited Partnerships have been prejudiced by evidence presented by and against claimants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashion Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. (the "Barranquilla Claimants"),[17] and the sheer force of

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[17]The Second Circuit discriminated against the Limited Partnerships by ascribing the following testimony presented in the defense of only the Barranquilla Claimants:

"The claimants tried to show that the monies were the legitimate profits from the sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing

numbers of the intercepted electronic communication apparently rendered the task of separation impossible for the lower courts, and spill over inevitable occurred.

Furthermore, the Second Circuit erroneously states that the United States established probable cause and presented evidence at trial that the source of each specific intercepted electronic fund transfer belonging to the Limited Partnerships was connected to the illegal drug transactions and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz Londono.

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were handed over to ship captains who toured the Caribbean island, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipment through charitable means." App. p. 18b.

The United States never presented any evidence what s ever to show that the specific intercepted electronic fund transfer came from any traceable illegal source.

The facts demonstrated at trial, through three tracing analysis charts, was that each individual electronic fund transfer intercepted, and later seized, were neither the traceable proceeds of illegal drug activity, nor were they traceable to any drug money laundering transactions, but came from specific sources that the United States investigated for over two years, and still failed to present any culpable evidence.

In today's climate of public attitude in the United State against Colombian citizens, and Colombia, the federal courts must be required to take extra

precautions against discriminatory over spilling of evidence presented in any large civil conspiracy case.

Thus for the reason that the United States failed to meet its burden of tracing, and because of the numerous errors of fact in its decision, the Second Circuit must be reversed.

V. THE FORFEITING OF ELECTRONIC FUNDS TRANSFER BECAUSE THEY WERE DERIVED FROM THE WORLD WIDE PARALLEL CURRENCY MARKET IS A PENALTY THAT IS BOTH DISPROPORTIONATE AND EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT AND AUSTIN.

The Second Circuit decision in the All Funds Case, directly conflicts with the decisions of this Court in Austin v. United States, 509 U.S. , decided June 28, 1993, 61 LW 4811 (June 29, 1993) (hereinafter "Austin"). See also Alexander v. United States, 509 U.S. , de-

cided June 28, 1993, 61 LW 4796 (June 29, 1993).

In the instant action the United States is implement its new policy regarding the "war on illegal drugs" by seeking to punish the Limited Partnerships, although innocent of any crime, because the electronic funds transfers intercepted, and seized came from the world wide parallel currency market, which the United States contend contains an unknown percentage of proceeds from illegal drug traffic.

Based on Austin, this is in violation of the Eighth Amendment.

In Austin, a North Dakota man had lost his car-repair business and his mobile trailer after selling two grams of cocaine to an undercover agent. The Government had disputed the contention

of the defendant, Richard Lyle Austin, that the seizure under a civil forfeiture law had violated the "excessive fines" clause.

The Government maintained that Federal laws that gave it the authority to take Mr. Austin's home and business were remedial because they were intended to permit the removal of tools of the drug trade. It also said the seizure was a proper way of repaying the Government for the expenses of law enforcement.

The Court's unanimous opinion in Austin, found that the Eighth Amendment applied to both civil and criminal proceedings and that the forfeiture laws had been intended at least to punish the property owner, and as such fell under the Eighth Amendment.

"The purpose of the Eighth Amendment, . . . , was to limit the government's power to punish. . . . The Excessive Fines Clause limits the government's power to extract payment, whether in cash or in kind, `as punishment' for some offense. . . . (citation omitted) `The notion of punishment, as we commonly understand it, cuts across the division between civil and the criminal law.' United States v. Halper, 490 U.S. 435, 477-448.. . . `It is commonly understood that civil proceedings may advance punitive and remedial goals, and conversely, that both punitive and remedial goals may be served by criminal penalties." Austin at 4813.

"In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We however, must determine that it can only be explained as serving in part to punish. We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to under stand the term." (emphasis added) Austin 4813.

"Our cases also have recognized that statutory in rem forfeiture imposes punishment." Austin at 4814.

As a noted above as the new policy in its war on illegal drugs the United States has determined to focus on the funds allegedly relating to narcotics trafficking. To this end the United States has determined to investigate all funds going to the Republic of Colombia, from whatever source, and punish those who use the parallel currency market.

However, in the instant action to forfeit the electronic fund transfer of the Limited Partnerships based on the fiction that the electronic funds transfer was guilty of some wrong since they came from the world wide parallel market, is disproportionate and an excessive fine in violation of the Eighth Amendment and the holding in Austin.[18]

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[18]It is also a violation of the Fifth Amendment due process clause to forfeit the property of the Limited Partnerships as truly

VI. THE SECOND CIRCUIT ERRED IN DENYING DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES TO "INTERCEPT," AND FOR THE UNAUTHORIZED DISCLOSURE OF ELECTRONIC COMMUNICATION IN COMPUTER STORAGE.

The Second Circuit is in direct conflict with mandates of Congress regarding the protection of "electronic communications" in transit and in computer storage, by refusing to grant an award of damages based on the admitted facts.

In support of their motion to dismiss under Rule 12(b)(6), the United State admitted that between July 16, 1990, and August 8, 1990, Messrs. Hui and Brown, without any judicial authori-

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innocent owners. See Austin p. 4815, footnote 10. It is important to note for the Court that the United States obtained an eight month stay on discovery based on its ex parte presentation that criminal indictments were involved. The Limited Partnerships have neither been accused of any crime nor indicted.

ty required under 18 U.S.C. § 2516(3) and § 2703(a), did instruct Intermediary Banks to:

(i) program "stop ques" in their computer modem devices, and not to comply with any accepted wire transfer instructions contained in any wire transfer going to the Republic of Colombia;

(ii) permit repeated unauthorized disclosure of accepted wire transfer instructions in transit to the Republic of Colombia, and in computer storage; and,

(iii) place into a "stop que" account at their respective banks the information related to intercepted wire transfer communications.

Despite these admissions of programming of "stop ques," and the repeated "disclosure" of electronic communica-

tion information by Intermediary Banks,[19] the Second Circuit denied the claims for damages.

However from the admitted facts liability of the United States exists because they did exactly what was specifically prohibited.

Consequently, because of the importance of the issues involved given the admissions of the United States, the Court is requested to exercise its power of supervision and reverse the Second Circuit.

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[19]The Senate Report at p. 3580. stated that, ". . . the Electronic Communications Privacy Act amends existing section 2520 of title 18 of the United States Code to incorporate violations involving . . . , **disclosure** . . . of . . . electronic communications.

VII. THE SECOND CIRCUIT ERRED IN DENYING DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.

The Intermediary Banks have admitted that they had placed the funds relating to each intercepted electronic funds transfer in an account in the name of each Limited Partnerships.

Also the Intermediary Banks admit to being compensated by the United States under the provisions of the Right to Financial Privacy Act, for the expenses they incurred in their collaboration.

Despite these admitted facts, and the fact that discovery was barred by the District Court, the Second Circuit held in the All Funds Case, that 12 U.S.C. § 3403(a), is not applicable because the Limited Partnerships is not a "customer" of Intermediary Banks.

The Limited Partnerships argues that liability does exist under the Right to Financial Privacy Act not only because the Intermediary Banks have admitted that they placed the intercepted electronic fund transfers in a "stop que" account in their computer storage;[20] but also because the Intermediary Banks were compensated for the expenses relating to their collaboration under the Right to Financial Privacy Act.

Because of the above admissions this Court should grant this Petition

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[20]The accounts had to be setup in accordance with the regulations of the Fedwire, SWIFT, and CHIPS systems. Said regulations requires that each electronic funds transfer which is delayed be maintained in a separate and distinct account apart from all others transfers. Also the spurious inference in the Second Circuit's opinion that the Limited Partnerships are not "partnerships" for purposes of the act disregards the Republic of Colombia Civil Code, and Section 101(7) of the Uniform Limited Partnership Act.

for Writ of Certiorari so to reverse the Second Circuit.

CONCLUSION

Through the admitted use of only a self executing general in rem warrant, and verbal telephone orders, the United States did knowingly procure the collaboration of the Intermediary Banks, in their programming of "stop ques" in their communication computer modem devices, so to acquire access for the United State of the information in the in transit electronic funds transfer communications of the Limited Partnerships, and disclose the Limited Partnerships's electronic communication information in computer storage.

Because these activities violated the protection given by Congress to "electronic communications" and "finan-

cial information," the Second Circuit's holding that the electronic communications were forfeitable, and its denying the claim for damages, must be reversed.

The Second Circuit's decision has not only serious factual errors, but more disturbingly it is drafted to disregard totally the following precise statutory language Congress enacted in 1986, to protect electronic communications from unauthorized interception and disclosure:

- 18 U.S.C. § 2510(4) and (5);
- 18 U.S.C. § 2516(3);
- 18 U.S.C. § 2511(1)(a) and (c);
- 18 U.S.C. § 2511(3)(a);
- 18 U.S.C. § 2703(a); and,
- 12 U.S.C. § 3403(a).

This willingness of the Second Circuit to look the other way when there is

admitted violation of federal statutes, just because only citizens and partnerships from the Republic of Colombia are involved, brings to mind the following colloquy that has been attributed to the great Chancellor, Sir Thomas More:

Roper: So! Now you give the Devil benefit of law!

More: Yes. What would you do, cut a great road through the law to get after the Devil?

Roper: Yes! I'd cut down every law in England to do that!

More: Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

* * *

Yes, I give the Devil benefit of law for my own safety's sake.

Robert Bolt, "A Man for All Season."

Whether or not the words be the historical More's or only the playwright's, the insight is both profound, and serves as the key foundation for requesting this Court to issue a writ of certiorari to the Second Circuit.

This Court must reverse the lower courts so to rein in their misguided enthusiasm to permit the use of the forfeiture laws to hack that great road through precise legislation recently enacted by Congress to protect electronic communications from the unauthorized access and disclosure which occurred here.

Furthermore, this Court should issue a writ of certiorari so to provide supervisory guidance to the federal courts in the enforcement of the Elec-

tronic Communication Privacy Act and the Right to Financial Privacy Act.

Respectfully submitted,

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